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LEGAL BASIS FOR THE QUARANTINE OF CUBA

The quarantine against shipments of offensive weapons to Cuba has been imposed by the United States in accordance with a recommendatory resolution of the Organ of Consultation established by the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). The validity of the action in international law depends on affirmative answers to two questions:

(1) Was the action of the Organ of Consultation authorized by the Rio Treaty; and

(2) Is the action consistent with the provisions of the UN Charter to which the Rio Treaty is by its own terms and by the terms of the Charter subordinate?

1. Authorization Under the Rio Treaty

The Rio Treaty, together with related agreements, constitute the Inter-American system. The paramount purpose of this system, as stated in the Treaty, is:

"to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and . . . to deal with threats of aggression against any of them."

The Treaty provides for collective action, not only in the case of armed attack, which is covered by Article 3, but also:

"If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . or by any other fact or situation that might endanger the peace of America . . ." (Article 6.)

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In such cases, the Organ of Consultation, comprised of the Foreign Ministers of the Member States or representatives specifically designated for the purpose, is to,

"meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent." (Article 6.)

The Organ of Consultation acts "by a vote of two-thirds of the Signatory States which have ratified the Treaty." (Article 17.)

The Treaty is equally explicit as to the measures which may be taken by the Organ of Consultation in any case covered by Article 6. These measures are listed in Article 8 and specifically include "use of armed force". Article 20 further specifies that decisions to take any of the measures listed in Article 8 shall be binding except that "no State shall be required to use armed force without its consent."

The action of the OAS in the present case falls readily within the framework of the procedures established by the Treaty. The Inter-American system has long recognized that the adherence by the present Government of Cuba to Sino-Soviet Communism is inconsistent with the principles of the Inter-American system, and has created a situation endangering the peace of the hemisphere. As early as the Seventh Meeting of Foreign Ministers of the Organization of American States in 1960, the Organization "condemned the intervention or the threat of intervention of extra-continental communist powers in the hemisphere" The Eighth

Meeting, at Punta del Este in 1962, went further. It declared that "the continental unity and democratic institutions of the hemisphere are now in danger." The source of that danger was the "subversive offensive of communist Governments." Among the "outstanding facts in this intensified offensive" was "the existence of a Marxist-Leninist government in Cuba which is publicly aligned with the doctrine and foreign policy of the communist powers." (Resolution I, Final Act, Eighth Meeting of Consultation of Ministers of Foreign Affairs Serving as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance.)

At that meeting, the Organization took the first collective measures designed to deal with the threat. It prohibited all trade in arms with Cuba, and excluded the present government of that country from participation in the organs of the Inter-American system.

More recently, on October 2 and 3 of this year, the Foreign Ministers of the American States, meeting informally in Washington, reiterated that "the Soviet Union's intervention in Cuba threatens the unity of the Americas and its democratic institutions" and that this called "for the adoption of special measures, both individual and collective."

Against this background the Council of the Organization of American States met on October 23 and constituted itself as Organ of Consultation in accordance with Article 12 of the Rio Treaty. The Organ considered the evidence before it of the secret introduction of Soviet strategic

missiles into Cuba in the face of Soviet and Cuban assurances to the contrary. It concluded that it was confronted with a situation that might endanger the peace of America within the meaning of Article 6. This considered judgment brought into play the authority to take one or more of the measures listed in Article 8. The resolution adopted by the Organ exercises this authority. It recommends'

"that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent."

The recommendation contained in the Resolution for the use of armed force if necessary was thus fully authorized by the terms of the Rio Treaty and adopted in accordance with its procedures. The quarantine being imposed is specifically designed "to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers" the offensive weapons which threaten the peace and security of the Continent. It represents a minimal use of force to achieve the stated objectives. The United States action thus falls within the terms of the OAS Resolution.

2. The UN Charter

(a) Regional Organizations

The Resolution of the Organ of Consultation and the quarantine imposed by the United States pursuant to that Resolution are entirely consistent with the Charter of the United Nations.

The Charter specifically recognizes regional organizations and assigns to them an important place in carrying out the purposes of the United Nations.

Article 52(1) states that

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

Article 52(2) provides that United National Members that have entered into "such arrangements" or who have constituted "such agencies" must "make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council." Paragraph 3 of the same Article requires the Security Council to "encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies . . ." Article 54 provides that, "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." In accordance with this provision, the Organ of Consultation provided that the Security Council would be informed of the contents of the Resolution of October 23rd.

The Charter limits the activities of regional organizations only in the Article 52(1) proviso that such activities must be "consistent with the Purposes and Principles of the United Nations." The Rio Treaty plainly meets this requirement. It was enacted by the High Contracting Parties "to improve the procedure for the pacific settlement of their controversies," in full accord with Article 52(2). The High Contracting Parties expressly reiterated "their will to remain united in an inter-American system consistent with the

purposes and principles of the United Nations." The Resolution and its implementation by the quarantine are in complete accordance with those purposes and principles. These measures are designed, in the opening words of the Charter, "to maintain international peace". They represent "effective collective measures for the prevention and removal of threats to the peace." Article 1(1).

The importance of regional agencies in the maintenance of peace and security was recognized in the earliest conceptions of the United Nations. The draft proposal which was prepared at the initial conference at Dumbarton Oaks is virtually the same as Chapter VIII of the Charter.

The framers of the Charter met in San Francisco in 1945 after the basic outlines of the most significant regional arrangement, the Organization of American States, were already established. The meeting was held subsequent to the Conference of the American Republics at which the Act of Chapultepec was approved. This Act recommended the execution of a treaty to establish a regional arrangement, and specifically provided that the "use of armed force to prevent or repel aggression" constituted "regional action which might appropriately be taken by the regional arrangements." The debates at the San Francisco Conference concerning regional organizations were held against this background, and the Organization of American States provided the principal context for the discussions.

When Article 52 was debated at the San Francisco Conference, the Chairman of the committee charged with considering regional arrangements, speaking as the delegate of Colombia, made the following statement concerning the relationship between the Inter-American system and Chapter VIII of the Charter:

"The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of

the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter."

No delegate disputed this statement and it must be viewed as generally accepted. The very language of the Act of Chapultepec as well as its purposes were adopted by the Rio Treaty. It is evident that the Treaty created the very type of arrangement contemplated by the Charter.

The records of the Conference reveal that a major role was envisaged for regional arrangements under the Charter. Mr. Perez, the Minister of Foreign Affairs of Venezuela, said "It is in the interests of all that any conflicts which may arise should be solved as quickly as possible in a satisfactory manner, and no one doubts that regional systems are most appropriate to this effect." The delegate from Mexico, Ambassador Najera noted, "In the chapter to which I am referring, the first consideration of the delegations of the American nations was to safeguard their greatest achievement, the most precious flower of cooperation for security through peaceful means." And the delegate of the United States, Senator Arthur Vandenburg, stated emphatically, "In my view we have infinitely strengthened the world organization by thus enlisting within its overall supervision, the dynamic resources of these regional affinities."

The history of events since the San Francisco Conference demonstrates the wisdom of the Charter's framers in entrusting to regional organizations the responsibility for handling regional disputes. Such organizations have close contact with the problems within their regions and thus can exercise considered and informed judgment in dealing with these problems. The Organization of American States is the prime example of this. The political process by which

it must operate ensures that action will only be taken after careful analysis. Measures to protect peace and security can only be directed or recommended by a vote of two-thirds of the High Contracting Parties. Article 20 of the Treaty expressly provides that no State may be directed to use armed force without its consent. The Organ of Consultation may only recommend but cannot compel the use of armed force. By the presence of such safeguards, this regional organization is able to take effective action with assurance that such action will be consistent with the limitations imposed by the United Nations Charter. It has taken such action in regard to Cuba by its October 23 Resolution, as implemented by the United States quarantine.

(b) Article 53

Article 53(1) of the UN Charter provides:

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ."

The quarantine measures here under consideration as approved by the Organ of Consultation do not constitute "enforcement action". Accordingly, these measures do not require Security Council authorization.

Twice before the Security Council has rejected the contention that the activities of a regional organization constituted "enforcement Action" within the meaning of Article 53 of the Charter. In September, 1960, the Council met to consider an allegation by the Soviet Union that a decision of the Organ of Consultation to take certain diplomatic and embargo measures against the Government of the Dominican Republic constituted "enforcement action". The Security Council did not accept that allegation. Earlier this year, Cuba asked the Security Council to consider decisions taken by the American Republics at Punta del Este, claiming that they required Security Council authorization. Again the Council disagreed.

Thus, it appears from the practice of the Security Council, that measures taken by a regional organization to deal with a threat to the peace, are not necessarily "enforcement action" even though they are obligatory in character. When, as here, they are recommendatory in character, it is clear that they cannot involve "enforcement action".

The construction of the phrase "enforcement action" is supported by its use elsewhere in the Charter. The expression appears at several places in the Charter in addition to Article 53. For example,

Article 2, paragraph 5 obligates the Members of the United Nations to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action". And Article 5 provides that

"A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council."

The "preventive" and "enforcement" action mentioned in these articles refers to action which the Council is authorized to take under Articles 40, 41, and 42. Article 40 provides for taking of "preventive action" in the form of provisional measures. Such measures are orders of the Council with which Member States are bound to comply. Articles 41 and 42 empower the Council to enforce its decisions by calling upon United Nations Members to apply certain measures or by taking action directly through air, sea, or land forces which are at the disposal of the Security Council. Again, in acting under Articles 41 and 42, the Security Council does more than recommend to Members steps which they might take to meet a threat to peace and security. Rather it decides upon measures and issues orders of enforcement which Member States are obligated under the Charter to carry out.

Council actions under Articles 40, 41, and 42 are to be distinguished from recommendations made by the Council under Article 39 or by the General Assembly in the discharge of its responsibilities as set forth

in Chapter IV of the Charter. In the exercise of its powers under Article 10 and 11, the General Assembly has on a number of occasions in the past recommended the use of armed force. The actions of the UN to repel aggression in Korea and to maintain order in the Congo are two such occasions. These actions were taken despite the contention made long ago that such measures constituted "action" which could only be taken by the Security Council. Since the Assembly's powers are only recommendatory in the field of peace and security, the exercise of these powers by the Assembly could not be considered either "preventive" or "enforcement" action.

This distinction between a Security Council measure which is obligatory and constitutes "action", on the one hand, and a measure which is recommended either by the Council or by the General Assembly on the other, is supported by the Advisory Opinion of the International Court of Justice, "Certain Expenses of the United Nations" (July 20, 1962). The Court held that the measures taken by the GA and the Security Council in Suez and the Congo were not enforcement action, in part, because they were only recommendatory as to participating States. Specifically, the Court stated:

"The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter,

namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. If the word 'action' in Article II, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article II, paragraph 2, has no application where the necessary action is not enforcement action."

Thus, in the context of United Nations bodies, "enforcement action" does not include action by a United Nations body which is not obligatory on all the Members. As used in Article 53(1), "enforcement action" refers to action by a regional organization rather than to action by an organ of the United Nations, but the words must be given the same meaning in this context. It follows that "enforcement action", as the phrase appears in Article 53(1), does not comprehend action taken by a regional organization which is only recommendatory to the Members of the Organization.

As was pointed out above, the Resolution authorizing the quarantine was agreed upon pursuant to Article 6 of the Rio Treaty. As a recommendation of the "use of armed force", it was specifically authorized by Article 8 of that Treaty. And it is, by the express terms of Article 20, the one measure which, when agreed upon by the Organ of Consultation, Member States are not obligated to carry out. Since States signatories of the Rio Treaty are not obligated to carry out the Resolution recommending quarantine, it does not constitute "enforcement action" under Article 53(1), and is therefore not subject to Security Council authorization.

DRAFT FOLLOWS

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When Article 52 was debated at the San Francisco Conference, the Chairman of the committee charged with considering regional arrangements, speaking as the delegate of Colombia, made the following statement concerning the relationship between the Inter-American system and Chapter VIII of the Charter:

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it must ~~operate~~ ensure that action will only be taken after careful analysis. Measures to protect peace and security can only be directed or recommended by a vote of two-thirds of the High Contracting Parties. Article 20 of the Treaty expressly provides that no State may be directed to use armed force without its consent. The Organ of Consultation may only recommend but cannot compel the use of armed force. By the presence of such safeguards, this regional organization is able to take effective action with assurance that such action will be consistent with the limitations imposed by the United Nations Charter. It has taken such action in regard to Cuba by its October 23 Resolution, as implemented by the United States quarantine.

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in Chapter IV of the Charter. In the exercise of its powers under Article 10 and 11, the General Assembly has in the past recommended the use of armed force. These actions were taken despite the contention made long ago that such measures constituted "action" which could only be taken by the Security Council. Since the Assembly's powers are only recommendatory in the field of peace and security, the exercise of these powers by the Assembly could not be considered either "preventive" or "enforcement" action.

This distinction between a Security Council measure which is obligatory and constitutes "action", on the one hand, and a measure which is recommended either by the Council or by the General Assembly on the other, is supported by the Advisory Opinion of the International Court of Justice, "Certain Expenses of the United Nations" (July 20, 1962). The Court held that the measures taken by the GA and the Security Council in Suez and the Congo were not enforcement action, in part, because they were only recommendatory as to participating States. Specifically, the Court stated:

"The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter,

namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. If the word 'action' in Article II, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action."

Thus, in the context of United Nations bodies, "enforcement action" does not include action by a United Nations body which is not obligatory on all the Members. As used in Article 53(1), "enforcement action" refers to action by a regional organization rather than to action by an organ of the United Nations, but the words must be given the same meaning in this context. It follows that "enforcement action", as the phrase appears in Article 53(1), does not comprehend action taken by a regional organization which is only recommendatory to the Members of the Organization.

As was pointed out above, the Resolution authorizing the quarantine was agreed upon pursuant to Article 6 of the Rio Treaty. As a recommendation of the "use of armed force", it was specifically authorized by Article 8 of that Treaty. And it is, by the express terms of Article 20, the one measure which, when agreed upon by the Organ of Consultation, Member States are not obligated to carry out. Since States signatories of the Rio Treaty are not obligated to carry out the Resolution recommending quarantine, it does not constitute "enforcement action" under Article 53(1), and is therefore not subject to Security Council authorization.